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IN THE

SUPREME COURT OF THE UNITED STATES

1974-75 TERM

No. 75-76

STATE OF SOUTH DAKOTA,

Petitioner

vs.

DONALD OPPERMAN,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

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FEDERAL STATUTES

28 U.S.C. § 1257 (3) 2

IN THE

SUPREME COURT OF THE

UNITED STATES

1974-1975 Term

No._____

STATE OF SOUTH DAKOTA,

Petitioner,

vs.

DONALD OPPERMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

Petitioner, the State of South Dakota, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of South Dakota entered in this proceeding on April 15, 1975.

I. OPINION BELOW

The opinion of the Supreme Court of South Dakota is reported at 228 N.W. 2d 152 (1975) and is attached hereto as Appendix A. The South Dakota trial court made an oral ruling from the bench on the Motion to Suppress which presented the legal issue involved in this Petition. A transcript of this oral ruling is attached hereto as Appendix B.

II. GROUND ON WHICH JURISDICTION IS INVOKED

The judgment of the South Dakota Supreme Court was entered on April 15, 1975. This Petition for Writ of Certiorari was filed within ninety (90) days of that date. The jurisdiction of this court is invoked under 28 U.S.C. 1257(3).

III. QUESTION PRESENTED

Whether the South Dakota Supreme Court erred in holding inadmissible evidence found in the glove compartment of a vehicle during a lawful inventory of the contents of the vehicle by police, which inventory followed the impoundment of the vehicle for parking violations, on the ground that the inventory was an illegal search under the Fourth Amendment of the United States Consitution.

IV. CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provision involved is the Fourth Amendment of the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

V. STATEMENT OF THE CASE

During the early morning hours of the 10th day of

December, 1973, a Vermillion, South Dakota, police officer issued a parking ticket to an automobile pursuant to a Vermillion ordinance which prohibits parking in the downtown area from 2:00 A.M. to 6:00 A.M. At approximately 10:00 A.M. on the morning of December 10th, a meter maid for the City of Vermillion issued another ticket to the automobile for an expired parking meter violation. After completing her rounds, the meter maid returned to the station and informed police officer Robert Frank that the vehicle had been issued another ticket.

Officer Frank then went to the vehicle and inspected the tickets. He called the towing service which was on call to the department that month and had the car towed to the city impounding lot.

The impounding lot had been the scene of past incidents of theft from locked cars kept there. Officer Frank observed a watch and numerous other items inside the car on the dashboard and on the backseat.

The officer then inventoried these items pursuant to the standard police department procedure. Using a tool kept by the tow truck operator, the officer unlocked the car and filled out a standard inventory sheet. The inventory covered the exterior condition, the seats, floor, and dashboard of the car, and the console glove compartment, which was closed but not locked. A quantity of marijuana was found in the glove compartment.

At 5:00 P.M. that day, Donald Opperman, the registered owner of the vehicle, appeared at the Police Department and received from the police the items of personal property that were not seized.

A complaint charging M . Opperman with possession of less than one ounce of marijuana was issued on the 20th day of December, 1973. On that date, he was arrested and taken before a magistrate.

At a trial held on February 21, 1974, Mr. Opperman was convicted of the above offense.

VI. REASONS FOR GRANTING CERTIORARI

A. THE JUDGMENT BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

The decision of the South Dakota court in this case is in conflict with *Cady v. Dombrowski*, 413 U.S. 433 (1973), on the question of whether evidence discovered inadvertently by police during a lawful examination of the contents of a legally impounded automobile is admissible. The decision is in conflict with *Harris v. The United States*, 390 U.S. 234 (1968), and with *Cooper v. California*, 386 U.S. 58 (1967), on the question of whether the purposes of safeguarding an automobile owner's property and protecting the police allow a full inventory of an automobile that is lawfully in police custody. The decision conflicts with *Cooper, supra*, on the question of whether a lawful inventory of an automobile includes an inventory of the contents of an unlocked glove compartment.

In *Cady v. Dombrowski, supra*, the defendant's automobile was towed from an accident and searched because it was believed that a weapon was in the car. This Court upheld the search emphasizing that (1) the car was in policy custody because it had to be moved and stored or it would have constituted a nuisance, and (2) the motive for the search was not to find incriminating evidence but to follow a standard police procedure. 413 U.S., at 442, 443. Both of these factors were clearly present in the instant case.

First, as in Cady, the automobile here was not

> . . .simply momentarily unoccupied on a street. Rather, like an obviously abandoned vehicle, it represented a nuisance, and there is no suggestion in the record that the officers' action in exercising control over it by having it towed away was unwarranted either in terms of state law or sound police procedure.

413 U.S., at 447. Mr. Opperman did not contend, nor did the South Dakota courts find, that the impoundment was illegal.

Second, it is equally clear that the motive was not to find evidence but to follow standard police procedure. The investigating officer did not know the defendent, had not seen the automobile before, and had no reason to think the automobile might contain incriminating evidence.

A large number of items were inside the car, including personal papers, shotgun shells, tapes, speakers, spark plugs, a class ring, etc. The lot in which impounded automobiles were stored had been the scene of past instances in which property had been stolen from locked cars.

The officer inventoried the condition of the exterior of the automobile and the contents of the interior, as was done for all impounded automobiles, and filled out a standard police form.

Thus in both *Cady* and the present case, the police came into contact with the vehicle because of their non-criminal community caretaking duties in the area of traffic regulation, and in both cases the purpose of their examination of the vehicle was something other than a search for incriminating evidence. The purposes of the inventory in this case were to safeguard the owner's property and to protect the custodians of the vehicle. These purposes were recognized in *Harris v. United States*, 390 U.S. 234 (1968) and in *Cooper v. California*, 386 U.S. 58 (1967).

In both *Cooper* and the present case the incriminating evidence was found in the glove compartment of the vehicle during an inventory. However, the South Dakota court held that an inventory must be restricted to safeguarding articles which are within the plain view of the officer's vision.

In *Cady*, this court held that the analysis of *Harris* was controlling. 413 U.S., at 442. Under this analysis, if the officer's presence is for a justified purpose, evidence which comes within his plain view is admissible. *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971).

In the present case the officer's presence and opening of the glove compartment were justified under *Cady*, *Harris* and *Cooper*, and the evidence discovered should have been held admissible.

In addition to being in conflict with these decisions, the present case conflicts with other actions of this Court regarding inventories of automobiles. In several cases this Court has denied certiorari where the opinion below upheld an inventory search. *Gravitt v. United States*, 484 F. 2d 375 (5th Cir. 1973), cert. denied 414 U.S. 1135 (1974); *Thomas v. Washington*, unreported, summary at 41 L.W. 3478, cert. denied, 413 U.S. 921 (1973); *United States v. Pennington*, 441 F. 2d 249 (5th Cir. 1971), cert. denied 404 U.S. 854 (1971); *United States v. Robbins*, 424 F. 2d 57 (5th Cir. 1970), cert. denied 402 U.S. 985 (1971); *United States v. Lipscomb*, 435 F. 2d 795 (5th Cir. 1970), cert. denied 401 U.S. 980 (1971).

In two cases, lower court judgments holding an inventory illegal were vacated. *Carey v. Gammons*, 475 F. 2d 1392 (3rd Cir. 1973), judgment vacated, 414 U.S. 807 (1973); *Heffley v. Hocker*, 420 F. 2d 881 (9th Cir. 1969), judgment vacated, 399 U.S. 521 (1970).

In this case there is no question that the impoundment was legal. There is absolutely no basis for even the slightest suggestion that the motive for the inventory was anything other than compliance with standard police procedure. The scope of the inventory did not exceed that of the inventory in *Cooper*. Yet in spite of these facts and the governing decisions of this Court, the South Dakota court held that the inventory was an illegal search. Thus the decision is in clear conflict with the relevant decisions of this Court.

B. THERE IS A CONFLICT BETWEEN THE STATE COURTS CONCERNING THE QUESTION PRESENTED.

A large number of automobile inventory cases have been decided by state courts in recent years. A review of these cases

reveals a number of fundamental differences in judicial response to the inventory situation.

Courts have both upheld 1/ and struck down 2/ inventories in a substantial number of cases. While the reasonableness of a search always depends on the facts of the particular case, *Cooper, supra*, 386 U.S. at 59, a decision by this Court in the present case would reduce the conflicting results of the decisions of the state courts. It would reduce the inconsistent resolution of the questions of when an inventory may be conducted and what the scope of the inventory may be.

1/ *State v. Achter*, ___ Mo. ___, 512 S.W. 2d 894 (1974); *City of St. Paul v. Myles*, 218 N.W. 2d 697 (Minn. 1974); *People v. Sullivan*, 29 N.Y. 2d 69, 323 N.Y.S. 2d 945, 272 N.E. 2d 464 (1971), reversing, 35 A.D. 2d 690, 315 N.Y.S. 2d 274 (1970); *State v. Raiford*, 7 Or. App. 302, 490 P. 2d 1036 (1971); *Cabbler v. Commonwealth*, 212 Va. 520, 184 S.E. 2d 781 (1971); *Warrix v. State*, 50 Wis. 2d 368, 184 N.W. 2d 189 (1971); *State v. Wallen*, 185 Neb. 44, 173 N.W. 2d 372 (1970); *Godbee v. State*, 224 So. 2d 441 (Fla. App. 1969); *State v. Criscola*, 21 Utah 2d 272, 444 P. 2d 517 (1968); *State v. Montague*, 73 Wash. 2d 381, 438 P. 2d 571 (1968); *St. Clair v. State*, 11 Md. App. 605, 232 A. 2d 565 (1967); *Heffley v. State*, 83 Nev. 100, 423 P. 2d 666 (1967); *People v. Trusty*, ___ Col. ___, 516 P. 2d 123 (1973); *People v. Willis*, 46 Mich. App. 436, 208 N.W. 2d 204 (1973).

2/ *State v. Bradshaw*, 41 Ohio App. 2d 48, 322 N.E. 2d 311 (1974); *Dixon v. State*, 16 Crim. L.R. 2140 (Md. Spec. App. 1974); *State v. Gwinn*, ___ Del. ___, 301 A. 2d 291 (1973); *State v. Nemrod*, 85 N.M. 111, 509 P. 2d 885 (1973); *Boulet v. State*, 17 Ariz. App. 64, 496 P. 2d 504 (1972); *Mozzetti v. Superior Court of Sacramento County*, 4 Cal. 3d 699, 94 Cal. Rptr. 412, 484 P. 2d 84 (1971). See *Embree v. State*, 488 P. 2d 588 (Okl. Cr. 1971); *Mayfield v. United States*, 276 A. 2d 123 (D.C. App. 1971).

While the South Dakota court held that only items in plain view could be inventoried, other courts have held that where the owner cannot be located the inventory may include the trunk of an automobile. *People v. Trusty*, ___ Colo. ___, 516 P.

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2d 123 (1973). See also *State v Gowans,* 18 Ariz. App. 110, 500 P. 2d 641 (1972); *Fruit v. State,*____Ok. Cr. App.___, 16 Crim. L.R. 2197 (1974). South Dakota differs from Nebraska on the question of whether a glove compartment is a proper part of an inventory. *State v. Wallen,* 185 Nebr. 44, 173 N.W. 2d 372 (1970).

While some courts have held that baggage may be opened and inventoried, *State v. Wallen,* 185 Nebr. 44, 173 N.W. 2d 372 (1970); *United States v. Davis,* 496 F. 2d 1026 (5th Circuit 1974), others hold that baggage should not be opened. *State v. Nemrod,* 85 N.M. 111, 509 P. 2d 885 (1973); *State v. Gwinn,* ____Del.___, 301 A. 2d 29 (1973). In Arizona, the trunk may be opened but baggage within the trunk may not be. See *Boulet v. State,* 17 Ariz. App. 64, 496 P. 2d 504 (1972), and *State v. Gowans,* 18 Ariz. App. 110, 500 P. 2d 641 (1972).

An Ohio court has held that the driver of the vehicle should be asked whether he wishes to have the vehicle inventoried or merely stored. *State v. Bradshaw,* 41 Ohio App. 2d 48, 322 N.E. 2d 311 (1974). A New Mexico court has held that an auto rental agency's request for impoundment, where the driver's possession was unauthorized, was irrelevent to the question of the inventory. *State v. Nemrod,*____N.M.___, 509 P. 2d 885 (1973).

The South Dakota court found that an inventory constitutes a search, but a Michigan court has held otherwise. *People v. Willis,* 46 Mich. App. 436, 308 N.W. 2d 204 (1973).

While numerous courts have alluded to the motive of protecting the police from false claims, *State v. Wallen,* 185 Nebr. 44, 173 N.W. 2d 372 (1970), *Heffley v. State,* 83 Nev. 100, 423 P. 2d 666 (1967), the South Dakota court found that removing objects in plain view would insulate the police from liability under South Dakota law. See also *Mozetti v. Superior Court of Sacramento County,* 4 Cal. 3d 699 94 Cal. Rptr. 412, 484 P. 2d 84 (1971).

Although the incidence of inventory cases has mushroomed, no uniform approach to them has developed. The intervention

of this Court is essential in order to prevent the continuation and increase in disparity between state courts.

C. THERE IS A CONFLICT AMONG THE FEDERAL COURTS OF APPEAL ON THE QUESTION PRESENTED.

In addition to the disparity between the state courts, there are conflicts between the states and the federal circuits in which they are located and among the federal circuit courts themselves on the question presented.

Inventories have been upheld in three circuits. *United States v. Pennington,* 441 F. 2d 249 (5th Cir. 1971), cert. denied 404 U.S. 854 (1971); *United States v. Fuller,* 433 F. 2d 533 (D.C. Cir. 1970); *United States v. Sifuentes,* 504 F. 2d 845 (4th Cir. 1974). Four other circuits have held inventories invalid. *United States v. Lawson,* 487 F. 2d 468 (8th Cir. 1973); *Carey v. Gammons,* 475 F. 2d 1397 (3rd Cir. 1973), judgn ent vacated, 414 U.S. 897 (1973); *Cady v. Dombrowski,* 471 F 2d 280 (7th Cir. 1972), reversed, 413 U.S. 433 (1973); *Uni ed States v. Capra,* 501 F. 2d 267 (2nd Cir. 1974).

In addition to this split, there are two circuits which have come down on both sides of the question, the Ninth Circuit and the Tenth Circuit. *Heffley v. Hocker,* 420 F. 2d 881 (9th Cir. 1969), judgment vacated, 399 U.S. 521 (1970); *United States v. Mitchell,* 458 F. 2d 960 (9th Cir. 1972); *United States v. Roe,* 495 F. 2d 600 (10th Cir. 1974); *United States v. McDevitt,* 508 F. 2d 8 (10th Cir. 1974).

The number of reported decisions in both the state and federal courts involving inventories indicates that the issue is a recurring problem in the administration of criminal justice. The disparity in decisions could be reduced considerably by a decision of this Court in the present case.

VII. CONCLUSION

For the reasons stated, it is respectfully submitted that certiorari should be granted, and that the judgment of the Supreme Court of South Dakota be reversed.

Respectfully submitted,

WILLIAM J. JANKLOW
Attorney General of South Dakota

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APPENDIX A

Judgment of the South Dakota Supreme Court

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

STATE OF SOUTH DAKOTA,

Respondent,

vs.

DONALD OPPERMAN,

Petitioner.

* * * *

APPEAL FROM DISTRICT COUNTY COURT
SECOND JUDICIAL DISTRICT, CLAY
COUNTY, SOUTH DAKOTA

HON. DONALD ERICKSON, JUDGE

OPINION FILED April 15, 1975

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WINANS, Justice.

Defendant-appellant was convicted of possession of less than one ounce of marijuana in violation of SDCL (1967) 39-17-95. He contends, as he did in the court below, that it was error for the trial judge to allow the product of the search and all fruits flowing from it to be introduced into evidence because the search was in violation of the Fourth Amendment to the United States Constitution.

The facts surrounding this search are as follows: During the early morning hours of December 10, 1973, Vermillion police officer, William Herrick, issued a parking ticket to appellant's automobile pursuant to a Vermillion ordinance which prohibits parking in the downtown area from 2:00 A.M. to 6:00 A.M. At approximately 10:00 A.M. on the morning of December 10th a metermaid for the City of Vermillion issued another ticket to appellant's vehicle for an expired parking meter violation. She returned to the station and informed Police Officer Frank that the vehicle had been issued a second ticket.

Officer Frank went to the car and inspected the tickets. He then called for the assistance of a tow truck operator who towed the vehicle to the city impound lot. At this time the vehicle was locked and all windows were closed. The police officer ordered the tow truck operator to break into the vehicle, which he succeeded in doing by unlocking the door with a tool. Frank then seized a number of articles, among which was a watch on the dashboard. These articles were in plain view and are not in issue for the purposes of this appeal.

After securing all articles of value within the area of his vision, the officer continued his exploration of the vehicle by entering the closed console where he found and seized a plastic bag containing a leafy substance which was later determined to be marijuana.

Prior to this seizure Frank had no probable cause to believe that the automobile contained contraband, nor was appellant under arrest. His car was towed for violating a mere parking ordinance and was searched pursuant to a Vermillion Police Department procedure.

I.

As a threshold question we must decide if a detailed inventory of a private vehicle is a search which falls within the Fourth Amendment prohibition against unreasonable searches and seizures.

The Supreme Court of the United States has not decided whether an inventory procedure is a search. In Cady v. Dombrowski, 1973, 413 U.S. 433, 93 S. Ct. 2523,2528, 37 L. Ed. 2d 706,715 (Fn.), Justice Rehnquist, noting the state's argument that an inventory is not a search because it is not conducted to uncover evidence of a crime, said, "We need not decide this issue". This court, however, must. Logic and well-reasoned decisions from other jurisdictions lead us to conclude that an intrusion into a citizen's vehicle, as in the instant case, is a search.

The California Supreme Court, in a factual situation close to the instant case, decided that an inventory procedure conducted pursuant to a police regulation is a search cognizable under the Fourth Amendment. See Mozetti v. Superior Court of Sacramento County, 1971, 94 Cal. Rptr. 412, 484 P. 2d 84.

In that case defendant was removed to a hospital after sustaining injuries in a two-car collision. Her vehicle was blocking the roadway and arrangements were made to have it towed to a storage facility pursuant to a California statute. Prior

to towing, in accordance with standard police department procedure, an officer of the Sacramento Police Department prepared an inventory of the contents of defendant's automobile. He opened an unlocked suitcase in the rear seat of the vehicle, apparently to determine if it contained anything of value. A plastic bag containing marijuana was found. Defendant's motion to suppress the evidence was rejected by the trial court. But on appeal the Supreme Court held that error was committed when the evidence found in the closed suitcase was not suppressed.

The prosecution in *Mozetti*, as in the instant case, sought to validate the inventory of defendant's vehicle by distinguishing between an inventory and a search. The state contended that an inventory is conducted not to uncover evidence of criminal activity, but to prevent the theft of articles left in the car. Thus it was argued the procedure is not a Fourth Amendment search.

Rejecting this theory the Supreme Court of California said, and we concur, that:

> "It seems undeniable that a routine police inventory of the contents of an automobile involves a substantial invasion into the privacy of the vehicle owner. *Regardless of professed benevolent purposes and euphemistic explication, an inventory search involves a thorough exploration by the police into the private property of an individual.* In that process suitcases, briefcases, sealed packages, purses – anything left open or closed within the vehicle – is subjected without limitation to the prying of authorities. Merely because the police are not searching with the express purpose of finding evidence of crime, they are not exempt from the requirements of reasonableness set down in the Fourth Amendment. Constitutional rights may not be evaded through the route of finely honed but nonsubstantive distinctions." (emphasis supplied) 484 P. 2d at 88.

The Fourth Amendment's prohibition against unreasonable search and seizure serves as a protective border between necessary investigations by governmental agents and the constitutional grant of privacy to our citizens. Rejecting a restricted interpretation of this amendment the Supreme Court stated:

> "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, 1967, 387 U.S. 523,528, 87 S. Ct. 1727, 1730, 18 L. Ed. 2d 930,935.

Contrary to this expression of the purpose of the Fourth Amendment by the United States Supreme Court, the State contends that if this Court approves inventory searches, we will not thereby give police an unbridled power to search for evidence without justification because a valid inventory does not have as its motive a desire to find evidence. We cannot accept this contention. As previously noted, the Fourth Amendment protects our citizens' right to privacy and it is mere semantics to say that a detailed search of one's car is not a substantial invasion of privacy, even if it is made for the professedly benevolent purpose of theft prevention. This Court does not subscribe to a limited and semantical reading of the concept of "search" as used in the Fourth Amendment. Rather, we believe that that Amendment:

> "* * * governs all intrusions by agents of the public upon personal security, and * *[makes] the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness. * * This seems preferable to an approach which attributes too much significance to an overly technical definition of

'search,' ". (citations omitted) Terry v. Ohio, 1968, 392 U.S. 1,18 Fn. 15, 88 S. Ct. 1868,1878, 2 L. Ed. 2d 889,904.

The Eighth Circuit Court of Appeals has also refused to attribute too much significance to an overly technical definition of "search". In United States v. Lawson, 1973, 8 Cir., 487 F. 2d 468,472, the Court said it would not be bound by a

> "* * * highly technical construction of the meaning of 'search,' unwarranted in our view of the Fourth Amendment. To consider an inventory procedure not to be a 'search' does violence to the concept of the Fourth Amendment as a protection of the privacy of the citizenry against unwarranted invasion by government officials."

In *Lawson* the Court upheld the lower court's holding granting defendant's motion to suppress evidence in the form of a revolver seized from the trunk of his impounded car by local police officers in Aberdeen, South Dakota. The Court held that because the only justification for the search of the automobile was its mere possession by the police, the gun found in the locked trunk was improperly seized and was inadmissible as evidence.

It should be noted that in *Lawson* the defendant was in police custody, on a charge of passing insufficient funds checks when his car was impounded and searched. The warrantless search there could conceivably have been justified as being incident to a lawful arrest. See Chimel v. California, 1969, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685. No such justification is present in the instant case where the only violation by defendant was that of a parking ordinance.

Were this Court to hold that an inventory is not a "search" within the meaning of the Fourth Amendment we would be placing government agents in a better position when they have

no reason to search, because then a general exploratory "inventory" will be upheld; but if required to secure a warrant, they would have to describe with particularity the place to be searched and the articles to be seized. In *Camara*, supra, the Supreme Court gave expression to the inconsistency which would result from removing inventory searches from the larger category of "searches" which fall within the purview of the Fourth Amendment.

> "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." 387 U.S. at 530, 87 S. Ct. at 1732, 18 L. Ed. 2d at 936.

Because a holding by us that inventories are not searches would lead to the encouragement of fishing expenditions and a whitling away of Fourth Amendment protection we decline to so hold. Mindful that "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears", Coolidge v. New Hampshire, 1971, 403 U.S. 443,462, 91 S. Ct. 2022,2035, 29 L. Ed. 2d 564,580, and adopting the principles expressed in *Terry*, *Camara*, *Mozetti* and *Lawson*, we hold that the inventory procedure used by the Vermillion police is a search involving a substantial invasion of privacy which must conform to the reasonableness requirement of the Fourth Amendment.

II

Because the police procedure in the present case in a search it must comply with the Fourth Amendment, which provides that:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches

and seizures, shall not be violated; and no warrants shall issue but upon probably cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Only *unreasonable* searches are condemned by this Amendment. This Court must, therefore, determine whether the instant search was unreasonable, and if so found, the evidence in question must be suppressed.

At the outset we observe that beside a few well drawn exceptions, searches of private property without consent are unreasonable when government agents are not acting pursuant to a valid search warrant. See, e.g., Stoner v. State of California, 1964, 376 U.S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856, and Katz v. United States, 1967, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576. As the Court explained in Johnson v. United States, 1948, 333 U.S. 10, 68 S. Ct. 367, 92 L. Ed. 436:

"The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveilance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

The automobile, however, occupies a somewhat different position than does immovable property in the constitutional scheme of things.

"[A]utomobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled

to seize." Chambers v. Maroney, 1970, 399 U.S. 42, 90A S. Ct. 1975,1979, 26 L. Ed. 2d 419,426.

This distinction arises from both the highly mobile character of the automobile and the fact that, "extensive, and often noncriminal contact with automobiles will bring local officers in 'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband." Cady v. Dombrowski, 1973, 413 U.S. 433,442, 93 S. Ct. 2523,2528, 37 L. Ed. 2d 706,715. Despite this distinction it must, of course, still be shown that the search was reasonable. See Preston v. United States, 1964, 376 U.S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777, and State v. McCreary 1966, 82 S.D. 111, 142 N.W. 2d 240.

It is difficult to draw a single, consistent thread through decisions which have passed on the reasonableness of vehicle searches. Justice Rehnquist acknowledged this in his oft-quoted dictum that:

"[T]he decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web." *Cady*, supra, 413 U.S. at 439, 93 S. Ct. at 2527, 37 L. Ed. 2d at 714.

Both petitioner and respondent have directed us to a trilogy of United States Supreme Court decisions which offer guidance in deciding whether the search in the instant case was reasonable.

In Cooper v. California, 1967, 386 U.S. 58, 87 S. C. 788, 17 L. Ed. 2d 730, defendant was arrested for a narcotics violation and his vehicle was impounded pursuant to a California statute which authorized the seizure of any vehicle used to unlawfully transport narcotics. The Court stated that "whether a search and seizure is unreasonable within the meaning of the Fourth

Amendment depends upon the facts and circumstances of each case". 386 U.S. at 59, 87 S. Ct. at 790, 17 L. Ed. 2d at 732. Looking to the facts of that case the Court in a 5-4 decision held the warrantless search to be reasonable because there was an intimate nexus between the reason for the arrest and the impoundment and subsequent search of the automobile. As pointed out by the Court:

> "[T]he officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car – whether the State had 'legal title' to it or not – was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained." 386 U.S. at 61, 87 S. Ct. at 791, 17 L. Ed. 2d at 732.

Cooper is clearly inapposite to the instant case because the vehicle here was not impounded for a forfeiture action. Nor was the reason for its impoundment (a parking violation) in any way related to the petitioner's subsequent arrest.

In arguing for the reasonableness of the instant search, the State places great weight on *Cady v. Dombrowski*, supra, where the Supreme Court held that the warrantless search of an automobile, which the officers reasonably believed to contain a gun, but which disclosed several bloody articles, was not an unreasonable search. Reliance on *Cady* ignores the factual considerations present there, but absent in the instant case. First, the automobile in *Cady* constituted a nuisance on the highway because it was inoperative due to the accident. The driver was unable to have the car towed because he was intoxicated and later comatose. Second, the police conducted the search for the revolver to prevent its falling into the wrong hands. The accident victim was a Chicago policemen, who the

police of Kewaskum, Wisconsin, believed was required by regulation to be armed at all times. When the revolver was not found on his person they had good cause to suspect it was in the vehicle. Therefore, this search, motivated by "concern for the safety of the general public", was held to be constitutionally reasonable.

As stated, vast factual distinctions separate the case at bar from *Cady*. Here the automobile was not located where it was a public nuisance. It was instead parked in a designated parking space. The record offers no reasons why petitioner could not arrange for the safekeeping of his vehicle at the time or after it was towed from where it had been parked. And most importantly, there was no reason for the Vermillion police to believe that the car contained anything which posed a potential threat to the public safety.

The final, and perhaps for our purposes most relevant, Supreme Court ruling on inventory searches is Harris v. United States, 1968, 390 U.S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067. In *Harris* the defendant's automobile had been seen leaving the site of a robbery. The car was traced and the defendant was arrested as he was entering his automobile. The police decided to impound the defendant's automobile. At this time the windows of the car were open and the door was unlocked. After the automobile had been towed to the impound area, and pursuant to a police regulation, an inventory of the articles in the vehicle was taken. The police officer placed a property tag on the steering wheel, rolled up the windows and locked all the doors. While the officer was rolling up the windows and locking the doors, he discovered a registration card, which lay face up on the metal stripping over which the door closed. The Court held that the registration card was not seized in violation of the Fourth Amendment because the registration card was in "plain view."

> "Once the door had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible. It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence." 390 U.S. at 236, 88 S. Ct. at 993, 19 L. Ed. 2d at 1069.

The holding in *Harris* is predicated on, and limited to, the "plain view" exception to the warrant requirement. The record of the instant case clearly reflects that the contraband seized was not the product of a plain view discovery.

Because the considerations which were pivotal in *Cooper, Harris* and *Cady* are lacking in the case at bar we must "depend upon an analysis of the 'reasonableness' of the search here in question." *Lawson,* supra, at 471.

Under a standard of reasonableness warrantless searches of vehicles are to be approved only in a few carefully defined instances, among which are: Where there exists both probable cause and mobility at the time of the search, Carroll v. United States, 1925, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543; when a search is conducted under a reasonable belief that the vehicle contains an object which might endanger the general public, *Cady v. Dombrowski,* supra; when a search is incident to a lawful arrest, *Chimel v. California,* supra; and when an automobile is lawfully held as evidence of a crime preparatory to the institution of forfeiture proceedings as in *Cooper v. California,* supra.

There are no circumstances present in the instant case to justify the warrantless search of the contents of the closed console. The search was not incident to a lawful arrest; not based on probable cause to believe the vehicle contained contraband; not justified by the nature of the police custody involved; nor were exigent circumstances present.

Addressing the content that police have a right to conduct inventory searches to protect themselves from groundless claims the Court in *United States v. Lawson,* supra, said:

> "For the police practice considered here to be found reasonable under the Fourth Amendment, absent a warrant or falling within a recognized exception to the warrant requirement, there must be a *minimal interference* with the individual's protected rights. A police duty to safeguard the owner's property does not automatically give the police the right to search." (emphasis supplied) 487 F. 2d at 475.

And to the same effect the United States Supreme Court has stated that:

> "[L]awful custody of an automobile does not of itself dispense with consitutional requirements of searches thereafter made of it, * * the reason for and the nature of the custody may constitutionally justify the search." Cooper v. California, supra, 386 U.S. at 61, 87 S. Ct. at 791, 17 L. Ed. 2d at 733.

Cognizant that mere custody of a vehicle is not sufficent to cause a divestiture of Fourth Amendment protections we hold that "minimal interference" with a citizen's constitutional rights means that police inventory searches must be restricted to safeguarding those articles which are within plain view of the officer's vision. This limitation upon the scope of an inventory search of a vehicle has found implicit approval by this Court in State v. Catlette, 1974, S.D., 221 N.W. 2d 25, where Justice Doyle speaking for the Court interpreted the case of *Lawson v. United States,* supra, as limiting a reasonable search to "removal of objects within plain sight". The opinion states that an

inventory search limited to removing objects in plain view, if done without an investigative notive, is a reasonable search*. We now explicitly approve this rule.

Applying this standard to the instant case would mean that the officer had a right to enter the vehicle to remove those objects in plain view, such as the watch on the dashboard, to a place of safety. He had no right to conduct an exploratory search of either the console, the trunk or a closed suitcase. Of course, while lawfully retrieving articles from inside the vehicle the officer need not blind himself to what is within his field of vision because as aready noted:

> "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Harris v. United States*, supra, 390 U.S. at 236, 88 S. Ct. at 993, 19 L. Ed. 2d at 1069.

When in possession of an impounded car the police are acting as gratuitous depositors. SDCL 43-39-11 provides that "[a] gratuitous depository must use at least least care for the

* "The court's discussion in United States v. Lawson, supra, implies to us that in that case reasonableness ended with the removal of objects within plain sight – objects which when spotted by a passing vandal would provide the temptation for exploration into the vehicle and damage to its contents. Just as the situation in Cady v. Dombrowski, supra, demanded the locating of the revolver to protect the public, the facts in Lawson did not justify a search of the trunk merely to protect the police from potential liability.

In the instant case, we find that the scope of the intrusion here, if done for noninvestigative reasons, was reasonably related to the permissible purpose of preventing police liability. The record reveals that the hatchet and tire iron could possibly have been seen from outside the care. There were in a position so that the police in trying to remove possible temptation from vandals would have found the hatchet and tire iron in 'plain view'. See Cady v. Dombrowski * * *, and Harris v. United States,". (citations omitted) 221 N.W. 2d 25 at 29.

preservation of the thing deposited." Certainly removal of those objects within plain view and closing of windows and locking of doors satisfies the minimal standard of "at least slight care", thus protecting the police from civil tort claims. This view is shared by the California Supreme Court which said "In no case is an inventory of items not within plain sight essential to safeguard the contents or to fulfill a 'slight' duty of care." *Mozetti*, supra, at 90.

Because the only justifying circumstance presented to this Court in support of the warrantless search of the closed console was naked custody of the vehicle we must conclude that the instant search was unreasonable.

The judgment appealed from is reversed.

DUNN, Chief Justice, and DOYLE and COLER, JJ., concur.

WOLLMAN, J., dissents.

WOLLMAN, Justice (dissenting).

Because the intrusion by the police into defendant's automobile, even if it is characterized as a search, was clearly reasonable under the rationale of Cady v. Dombrowski, 1973, 413 U.S. 433, 93 S. Ct. 2523,2528, 37 L. Ed. 2d 706, I would hold that the trial court did not err in denying defendant's motion to suppress the evidence.

Defendant's automobile was first ticketed at 3 a.m., when an officer observed it parked on a street a short distance from a sign that informed the public that parking was prohibited from 2 a.m. to 6 a.m. Apparently the vehicle remained in place until approximately 10 a.m. the same day, when another police officer issued a ticket for overtime parking. In accordance with standard police procedures, the vehicle was then towed to the impoundment lot, where, again according to established routine procedures, an officer made an inspection of the exterior condition of the automobile. The glove compartment was unlocked. There was no entry by the police into the locked trunk compartment.

The officer who conducted the inspection and inventory testified that all vehicles taken to the impoundment lot are inventoried against a standard inventory sheet. This is done because in past instances property has been stolen from locked cars in the impoundment lot. The officer testified that he had never seen defendant's vehicle before, that he did not know defendant, and that he had no reason to suspect that the automobile might contain drugs.

There is nothing in the record to indicate that the police acted illegally, unreasonably or improperly in towing defendant's automobile from where it was illegally parked to the impoundment lot. The officers apparently treated defendant's automobile as they would have treated any other automobile found in the same circumstances. The record reveals that the Vermillion police department tows away vehicles for violation of ordinances designating restricted parking zones. The fair inference from the testimony of the officers is that vehicles thus illegally parked in the downtown area of Vermillion are considered to present more of a problem to city officials than those that are parked merely in violation of parking meter restrictions. The following language from Cady v. Dombrowski, supra, is applicable here:

> "* * * The Thunderbird was not parked adjacent to the dwelling place of the owner as in Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), nor simply momentarily unoccupied on a street. Rather, like an obviously abandoned vehicle, it represented a nuisance, and there is no suggestion in the record that the officers' action in exercising control over it by having it towed away was unwarranted either in terms of state law or sound police procedure."

The case of United States v. Lawson, 8 Cir., 487 F. 2d 468, is distinguishable. In that case, defendant was present at the

time his vehicle was seized by the police. There was nothing in the record to indicate that it was necessary for the police to impound the vehicle. (The Government expressly disavowed any contention that the search was incidental to a lawful arrest. 487 F. 2d at 469). Entry was made into the locked trunk compartment of the vehicle.

I would not restrict the police to an inventory of only those items that are in plain view within the interior of an automobile. Whether an inspection of the interior of a locked glove compartment would be reasonable or unreasonable would depend upon the circumstances under which such entry was made. Cady v. Dombrowski, supra. What was said in United States v. Gravitt, 5 Cir., 484 F. 2d 375, is applicable here:

> "* * * But we are confident that here, as in other contexts, reviewing courts will be fully capable of assuring that the scope of the intrusions involved will be tailored to the specific public interests which lie at the root of the finding that the intrusions are reasonable." (Citations omitted) 484 F. 2d at 380.

It would affirm the judgment.

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APPENDIX B

Oral ruling of South Dakota Circuit Court
February 21, 1974

ERICKSON, J.

Yes, gentlemen, quoting from the United States v. Lawson, on page 477, I think the Court sets forth the test, "We think the proper approach to the area is the access reasonableness of the police conduct in light of all the circumstances in the case without giving in the effect of the presence or absence of the police regulation."

The testimony of this particular case which in the fact of the particular area was the impound lot where it was located at, and it is highly insecure, in light of the fact the previous steps of the property from the automobiles parked, there can be no question that the police impounded this car under lawful city ordinance in the City of Vermillion.

It is the opinion of the Court that the basic test is whether or not it was reasonable to search under the circumstances. I find under this case, under the circumstances set forth in the Preliminary Hearing, the search was reasonable, and your motion is denied, Mr. Ulrich.